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No. 92-1550

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1993

ABF FREIGHT SYSTEM, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does an employee forfeit the remedy of reinstatement with backpay when an Administrative Law Judge finds that he purposefully testified falsely during the administrative hearing?

PARTIES TO THE PROCEEDING

(Rule 29.1 Statement)

AFB Freight System, Inc. is a wholly owned subsidiary of Arkansas Best Corporation. ABF Freight System, Inc. has one subsidiary by the name of ABF Freight System (BC), Ltd. Respondent is the National Labor Relations Board, an agency of the United States government. Michael Manso is an individual who ABF Freight System, Inc. has been ordered to reinstate to employment in Albuquerque, New Mexico.

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Tenth Circuit has been reported at 982 F.2d 441 (10th Cir. 1992) and is included at Pet. for Cert., App. A-1.¹

The Decision and Order of the National Labor Relations Board and the Administrative Law Judge's Decision

¹ The Appendix to the Petition for Writ of Certiorari is cited as "Pet. for Cert., App. ____." The Joint Appendix filed with this Brief on the Merits is cited as "J.A. ____."

have been reported at 304 NLRB No. 75 (1991) and are included at Pet. for Cert., App. B-1.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1988). The judgment of the Court of Appeals was entered on December 29, 1992 (Pet. for Cert., App. A-1).

The Court of Appeals for the Tenth Circuit had jurisdiction over the National Labor Relations Board's Final Order pursuant to 29 U.S.C. § 160(e) (1988).

STATUTES INVOLVED

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1988), provides:

Whenever it is charged that any person has engaged or is engaging in any such unfair labor practice, the Board . . . shall have the power to issue and caused to be served upon such person a complaint stating the charges . . . and containing a notice of hearing. . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts in the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

Section 10(c) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(c) (1988), provides:

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

The text of all statutory provisions referred to in this Brief are included at Pet. for Cert., App. C-1.

STATEMENT OF THE CASE

At issue in this appeal is the integrity of the NLRA and its adjudicatory system. Can an employee who lies to his employer and then repeats his lie to an administrative law judge, during a formal NLRB proceeding, be reinstated to his job and awarded backpay? A majority of circuits that have addressed this issue have said "no." With virtually no discussion of the contrary authority or rationale for its decision, however, the Tenth Circuit condoned perjured testimony by the charging party in this case and rewarded him with backpay and reinstatement.

ABF Freight System, Inc. ("ABF") is an interstate trucking company with freight terminals in several cities, including Albuquerque, New Mexico. Dock workers at the Albuquerque terminal are represented by Local 492 of the International Brotherhood of Teamsters, Warehousemen & Helpers of America ("Local 492"). Wages, hours, terms and conditions of employment for ABF's dock workers in Albuquerque are set out in national and regional labor contracts respectively known as the

National Master Freight Agreement ("NMFA") and Western States Area Supplemental Agreement ("WSA").

Michael Manso was hired as a casual dock worker at the Albuquerque terminal in April 1987. As an ABF employee, Mr. Manso was represented by Local 492 and was covered by the NMFA and WSA. Article 46, section 1 of the WSA provides that covered employees can only be terminated with "just cause." One warning notice for an offense is required before termination may be imposed, except for certain serious offenses, such as dishonesty, which can result in immediate discharge.

The specific events material to this appeal began in the Spring of 1989. On June 19 of that year, Mr. Manso was discharged from employment after two incidents of failure to protect start time. For a casual like Mr. Manso, failure to protect start time means he was unavailable for work at a time when he was subject to being called by ABF.

Mr. Manso grieved his June 19 termination and explained at the hearing, for the first time, that his telephone was not working. The Arizona-New Mexico Joint State Committee commuted Mr. Manso's discharge to a suspension without pay. Mr. Manso was reinstated to the casual list within a week after his June discharge.

Not long after completing his suspension, Manso was late for work on two occasions. The first incident was on August 11, 1989 and he was given a warning letter for tardiness. The second incident was on August 17, 1989 and this time he was discharged.

As an excuse for his tardiness on August 17, 1989, Mr. Manso told his supervisor, Ed Fultz and Branch Manager Mike Long that his car broke down on the freeway. He volunteered that he was assisted by Officer Smith of the Bernalillo County Sheriff's Department. (J.A. 73). When pressed for specifics, however, Mr. Manso became evasive and said he did not want to explain why he was late. At the suggestion of Local 492 Shop Steward Walter Maesta, Ed Fultz and Mike Long checked out Mr. Manso's story with the Bernalillo County Sheriff's Department. After doing that, they concluded that Mr. Manso's explanation was not legitimate and that his tardiness was not excused. Mr. Manso was discharged on August 21, 1989.

Through Local 492, Mr. Manso again lodged a grievance and again a hearing was held before the Arizona-New Mexico Joint State Committee ("JSC"). The JSC is comprised of an equal number of representatives of labor and management - none of whom can be affiliated with the company or local union involved in the dispute. This time the JSC concluded that just cause existed for the termination of Mr. Manso and denied his grievance. Under WSA Article 45, § 1(a), the JSC's decision was final and binding.

After losing his grievance, Mr. Manso filed an unfair labor practice charge with Region 28 of the National Labor Relations Board. He alleged that he was discharged in violation of NLRA §§ 8(a)(3) and (4). 29 U.S.C. § 158(a)(3) and (4) (1988) because he previously had filed an unfair labor practice charge and provided testimony to Region 28 of the Board. The unfair labor practice charge challenging Mr. Manso's August 1989 discharge was the

subject of a hearing before Administrative Law Judge Walter J. Maloney the week of January 8, 1990.

At the hearing, Mr. Manso testified under oath. He repeated the story about his car breaking down while on his way to work on August 17, 1989. (J.A. 104-107). He testified that his wife came to pick him up. (J.A. 105 & 106). Adding a new twist to the story he originally told Ed Fultz and Mike Long, Mr. Manso testified that Officer Smith of the Bernalillo County Sheriff's Department had pulled him over for speeding, that his wife was with him at that time. (J.A. 106, 111-115). To Mr. Manso's and Counsel for the General Counsel's visible surprise, however, Officer Smith appeared and testified at the hearing. (J.A. 123-128). In flat refutation of Mr. Manso, Officer Smith testified that he distinctly recalled Manso was alone when he stopped him for speeding the morning of August 17 at a time long after Manso should already have been at work. Manso told Officer Smith that he was speeding because he was late for work. Manso never mentioned any car trouble and Officer Smith did not witness any car trouble. (J.A. 124-127).

Given Officer Smith's testimony, the Administrative Law Judge recognized the implausibility and direct contradiction of Mr. Manso's testimony. As to Manso's excuse for being late for work the day he was fired, Judge Maloney specifically found that:

"Manso was lying."

(Pet. for Cert., App. B-59). The finding that Manso purposefully testified untruthfully was neither rejected nor questioned by the Board or Tenth Circuit.

In its decision, the Tenth Circuit affirmed the Board's award of reinstatement and backpay to Manso, holding that the Board did not abuse its discretion in concluding that Manso's misconduct was not sufficiently egregious to require the denial of reinstatement. (Pet. for Cert., App. A-19). No meaningful explanation was given by the Tenth Circuit for taking opposite sides with the other courts of appeal that have declined to enforce NLRB orders benefiting individuals who deliberately gave false testimony. This Court granted certiorari to resolve the clear conflict between the Tenth Circuit and the Seventh, Eighth, and Ninth Circuits. (J.A. 35).

SUMMARY OF ARGUMENT

Some propositions carry such common sense as to defy argument. One such proposition is that individuals who stand to gain financially from formal proceedings under law should not benefit from serious abuse of those proceedings. In unfair labor practices under the NLRA, a majority of circuits faced with the anomaly of a prevailing charging party who gave deliberately false testimony have accepted this proposition with little discussion.

The Tenth Circuit in this case decided that the integrity of Board hearings is not that important. Under the tacit rationale that the end justifies the means, the Tenth Circuit enforced an order of reinstatement of a charging party despite an unchallenged finding that he "was lying" in his sworn testimony to the Administrative Law Judge.

The Tenth Circuit's decision is wrong not just because it defies common sense – it defies sound public policy, it defies precedent, and it defies the National Labor Relations Act. First, the Act requires that witnesses in Board hearings swear under oath to tell the truth. When Mr. Manso lied to Judge Maloney, he was violating the Act.

Second, federal labor policy as embodied in the NLRA does not require that charging parties or discriminatees be awarded backpay and reinstatement just because an unfair labor practice has been found. In the false testimony context, the circuit courts have made that point clear. In cases involving post-termination misconduct by the charging party, the NLRB and circuit courts have also denied make-whole relief. The purpose of the Act is to protect the rights of employees to organize for purposes of collective bargaining and to minimize disruptions of interstate commerce, not to see that individuals are compensated for violations of the Act.

Third, the Board has broad powers to protect interstate commerce and to deter violations of the Act without turning a blind eye to manipulative abuse of process by charging parties. Cease and desist orders, notice posting, visitorial clauses, sanctions for repeat offenders, and contempt orders are significant tools available to the Board to command respect for the Act. Awards of backpay are commonly of little financial significance to corporate respondents, but when those awards are made to individuals who seriously abuse NLRB processes, the Board engenders disrespect and undermines the Act.

Fourth, loss of remedies by unfair tactics is nothing new. At common law and under the Federal Rules of

Civil Procedure, nefarious choices by individuals seeking to enforce rights can result in loss of remedies. Our system of justice necessarily requires that participants play by the rules. Allowing those who deliberately break the rules for the end of financial gain to realize a benefit from their illicit means is abhorrent to the administration of justice.

ARGUMENT

I.

AWARDING BACKPAY AND REINSTATEMENT TO CHARGING PARTIES WHO LIE DURING TESTIMONY IN AN UNFAIR LABOR PRACTICE CASE IS INCONSISTENT WITH ENFORCEMENT OF THE NLRA

Enforcement of the NLRA is an important public interest. No statute or policy exists in isolation, however, and years of adjudication under the NLRA provides a striking example of the federal courts and the Board's challenge to reconcile federal labor policy with other sometimes conflicting or overriding interests. In this case, there is a seeming conflict between the Board's preference for make whole relief in unfair labor practice cases and the statutory obligation and public policy that witnesses be sworn to tell the truth. On closer examination, the conflict is illusory and enforcement of the NLRA is not frustrated by denying backpay and reinstatement to individuals who seek to gain those remedies by giving false testimony.

A. The NLRA Itself Requires That Witnesses Bind Themselves To Tell The Truth.

The Board is a quasi-adjudicative body with an elaborate system for conducting evidentiary hearings, making findings of fact, and applying the facts to law under the NLRA. To safeguard the fact finding process, Congress directed that unfair labor practice proceedings:

shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States.

NLRA § 10(b), 29 U.S.C. § 160(b) (1973).²

Rule 603 of the Federal Rules of Evidence requires every testifying witness "to declare that the witness will testify truthfully. . . ." There are no circumstances where it is "impracticable" to apply Rule 603 in unfair labor practice proceedings or to otherwise excuse a witness from having to tell the truth. Expressly and by practice, the obligation to tell the truth in unfair labor practice hearings is required by the Act and disregard of that obligation violates the statute.

Consistent with Rule 603 and Section 10(b), Administrative Law Judges administer the following oath to each witness participating in an NLRB hearing:

Do you solemnly swear that the testimony which you will give in this proceeding will be

² Unfair labor practice hearings are conducted by Administrative Law Judges. After an unfair labor practice hearing, an Administrative Law Judge renders an initial recommended decision to the Board. See Section 4(a), 29 U.S.C. § 154(a) (1973).

the truth, the whole truth and nothing but the truth, so help you God?

See National Labor Relations Board Manual Division of Judges, 17008. The oath is administered to witnesses on an individual basis and in a manner that impresses upon them the importance and solemnity of their promise to tell the truth. NLRB Manual Division of Judges 17008.2. Canon 36, Judicial Ethics. At the hearing in Albuquerque, Michael Manso was administered the oath and bound himself to testify to "nothing but the truth."³

Toward the goal of reaching the truth, courts have criticized the Board's reticence to apply the Federal Rules of Evidence. In *NLRB v. Stark*, 525 F.2d 422 (2d Cir. 1975), cert. denied, 424 U.S. 967 (1976), for example, the Second Circuit condemned a long-standing Board policy against sequestering alleged discriminatees who are witnesses in an unfair labor practice proceeding. The court explained that administrative law judges needed to have discretion to invoke F.R.E. 615 to assure a fair hearing. *Id.* at 428-30. In response to criticism from the courts, the Board eventually changed its policy on sequestration of witnesses. See *Unga Printing Corp.*, 237 NLRB 1306 (1978).⁴

³ For a discussion concerning the historical background of the witness oath, see generally Comment, *A Reconsideration of the Sworn Testimony Requirement*, 75 Mich. L. Rev. 1681 (1977).

⁴ See also *General Engineering, Inc. v. NLRB*, 341 F.2d 367, 374-375 (9th Cir. 1965) (NLRB wrongfully revoked subpoenas directed to Board employees where no recognized privilege was claimed); *NLRB v. Overseas Motors, Inc.*, 818 F.2d 517 (6th Cir. 1987) (restriction of employer's cross-examination of former employee regarding interim earnings wrongfully denied employer fair hearing regarding amount of backpay owed).

Plainly, the obligation that witnesses tell the truth in unfair labor practice proceedings is embedded in the NLRA and use of available safeguards against false testimony are important to federal labor policy.

B. Nothing In The NLRA Requires Award Of Backpay And Reinstatement In Every Case.

The purpose of the NLRA is to protect interstate commerce by securing the right of employees to organize, to bargain collectively through representatives of their own choosing, and to engage in other protected concerted activities. *NLRB v. Penn. G. Lines*, 303 U.S. 261 (1938); NLRA §§ 1 and 7, 29 U.S.C.A. §§ 151 and 157 (West 1973 & Supp. 1993). Unfair labor practice proceedings are intended to serve public policy, not the interests of charging parties or alleged discriminatees. See *NLRB v. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO*, 391 U.S. 418 (1968). See also *International Union, UAW-CIO v. Russell*, 356 U.S. 634, 643 (1958); *Virginia Elec. and Power Company v. NLRB*, 319 U.S. 533, 543 (1943). No language in the Act or its legislative history indicates that Congress considered the pecuniary interests of charging parties and alleged discriminatees superior to preserving the integrity of the witness oath in adjudicatory proceedings.

Although the NLRB may award reinstatement with backpay in unfair labor practice cases, that remedy is not "mechanically compelled by the Act." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941). Authority to order affirmative relief under section 10(c) is incidental to the primary purpose of curtailing unfair labor practices.

Once again, the Board's predilection is uncompelled by language in the NLRA. *Shepard v. NLRB*, 459 U.S. 344 (1983); *United Constr. Workers v. Laburnum Corp.*, 347 U.S. 656, 666-67 (1954).⁵

Significantly, reinstatement under section 10(c) is an equitable remedy. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937). "Equitable remedies are a special blend of what is necessary, what is fair and what is workable." *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 777 n.39 (1976), quoting *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973).⁶ To repeat a maxim, "a man must come into a court of equity with clean hands," *Eyre, C.B., Dering v. Earl of Winchelsea*, 1 Cox Eq. 318, 319 (1787).

While reinstatement is generally appropriate when an employee has been discharged in violation of the NLRA, it is inappropriate when an employee demeans Board processes to obtain that remedy. In that situation, the remedy of reinstatement must be subordinated to another equity – maintaining the integrity of the oath. To say otherwise is to embrace in adjudicatory proceedings the philosophy that the end justifies the means.

Federal appellate courts confronted with the issue have concluded, at least tacitly, that the end does not

⁵ Section 10(c) authorizes the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act [chapter]." 29 U.S.C. § 160(c) (1988).

⁶ In *Franks*, the court indicated that the circumstances when make-whole relief is available under the NLRA are narrower than the circumstances when such relief is available under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. 424 U.S. at 767 n.29.

justify the means. With their equitable and supervisory powers over the Board,⁷ the courts have directed the Board to consider three factors when evaluating the propriety of make-whole relief: (1) the degree and kind of unlawful conduct committed by the employer and the employee, (2) the relationship between the conduct of both, and (3) the probable impact of selecting a particular remedy. *Golden Day Schools, Inc. v. NLRB*, 644 F.2d 834, 840 (9th Cir. 1981); *NLRB v. Thayer Co.*, 213 F.2d 748, 755 (1st Cir. 1954), *cert. denied*, 348 U.S. 883 (1954). A balance must be struck between the severity of the unfair labor practice and an employee's misconduct.

Applying the above factors to the instant case mandates denial of make whole relief to Manso. First, ABF's decision to discharge Manso under its tardiness policy, even if considered unlawful under the NLRA, pales in comparison to Manso's decision to give false testimony. The conduct with which ABF has been charged was permissible until relatively recently in American history and is not a crime; Manso's conduct at the unfair labor practice hearing, by contrast, has been prohibited since early days of the common law and is a felony.⁸

⁷ *NLRB v. Greensboro News*, 843 F.2d 795, 798 (5th Cir. 1988); *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1095 (7th Cir. 1984).

⁸ The federal perjury statute is codified at 18 U.S.C. § 1621 (1988). There are six elements to perjury: (1) an oral statement; (2) that is false; (3) made under oath; (4) with knowledge of its falsity; (5) in a legal proceeding or by affidavit; and (6) to a material matter. See *United States v. Debrow*, 346 U.S. 374 (1953). See generally, 4 W. Blackstone, Commentaries 136-37. Each of these elements is satisfied by Judge Maloney's findings regarding Manso's testimony at the hearing in Albuquerque.

Second, there is no causal relationship between ABF's conduct and Manso's conduct. There would not have been an unfair labor practice hearing but for the charge against ABF, but ABF did not compel Manso to commit perjury. To lie was his decision. Only the most fervent predeterminist could argue otherwise.

Third, the implication of reinstating a perjurer and awarding backpay is demoralizing. As Chief Justice Burger explained in *United States v. Mandujane*, 425 U.S. 564 (1976):

Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative.

Id. at 576.

One need only imagine the thoughts of Michael Manso's co-charging party (Mr. Andrew Trujillo) and the alleged discriminatees in the companion case who attended the hearing in Albuquerque, who did not commit perjury, who witnessed Manso wrap himself in a conspicuous lie – and who ironically lost their cases. To them and to others, the implication is plain – perjury pays. The end justifies the means.

C. Making Charging Parties Suffer The Consequences Of Deliberately Giving False Testimony Will Not Undermine The NLRB's Authority To Enforce The Act.

Circumstances abound in which backpay, reinstatement, and other forms of make-whole relief have been denied by the courts despite a finding that an unfair labor

practice was committed. To avoid harmful consequences from an award of reinstatement and backpay to charging parties guilty of misconduct, dishonesty, or false testimony at an ULP hearing, several circuits have refused to enforce NLRB orders granting make whole relief.

The common thread running between the decisions denying reinstatement and backpay is that the policies of the Act are not satisfied by rewarding wrongdoing. Most recently, in *Precision Window Manufacturing v. NLRB*, 963 F.2d 1105 (8th Cir. 1992), the Eighth Circuit held that an employee who was discharged in violation of Section 8(a)(3) for engaging in protected union activity forfeited his right to reinstatement by making false statements under oath about his union activity during an unfair labor practice proceeding. In so holding, the Eighth Circuit pointedly stated:

this court refuses to take the Board's processes as lightly as the Board apparently does. . . . The purposes and policies of the Act do not justify full reinstatement of an employee whose untruthful testimony abused the process he now claims should grant him full relief.

Id. at 1110, citing *Iowa Beef Packers v. NLRB*, 331 F.2d 176, 185 (8th Cir. 1964) (reinstatement and backpay denied to an employee where he had given false testimony at a NLRB hearing). This rationale underlies other circuit court decisions refusing to enforce NLRB orders of

backpay and reinstatement to charging parties who abused the system.⁹

Consistent with the majority view among circuits that have considered the Board's practice of elevating its preference for make-whole relief above honesty in sworn testimony, the circuit courts have consistently declined to enforce orders of reinstatement to employees guilty of unlawful or offensive conduct. To do so "would bid ill for all concerned," and renewing the employment relationship would not further the policies of the Act. *NLRB v. Apico Inns of Cal., Inc.*, 512 F.2d 1171, 1175-76 (9th Cir. 1975) is a good example. There, the Ninth Circuit refused to enforce an order of reinstatement to an employee who regularly insulted a manager in front of customers and engaged in other "reprehensible" conduct. In *NLRB v.*

⁹ *NLRB v. Coca-Cola Bottling Co.*, 333 F.2d 181, 185 (7th Cir. 1964) (employee's misconduct exemplified by his pattern of falsification and deceit during his employment, climaxed by his false testimony at the hearing, disqualified him from reinstatement or other employment rights). See also *NLRB v. Magnusen*, 523 F.2d 643 (9th Cir. 1975) (employee who was discharged in violation of Section 8(a)(3), but who admitted lying during a Board hearing concerning the time reported on his time card, was denied reinstatement). Likewise, the Seventh Circuit declined ordering reinstatement because an employee fraudulently used an assumed name to collect unemployment while working for an employer. *NLRB v. Mutual Maintenance Service Co., Inc.*, 632 F.2d 33 (7th Cir. 1980). See also *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380 (8th Cir. 1980) (full reinstatement denied because of an employee's dishonesty in failing to report earnings while collecting unemployment compensation benefits).

The same conclusion has been reached in labor arbitration cases. See *Aristocrat Travel Products, Inc.*, 52 Lab. Arb. Cases (BNA) 314 (1963).

Commonwealth Foods, Inc., 506 F.2d 1065, 1068 (4th Cir. 1974), the Fourth Circuit refused to reinstate employees where there was substantial evidence that they were engaging in theft. Even the Tenth Circuit held, in *NLRB v. Breitling*, 378 F.2d 663 (10th Cir. 1967), that a charging party who confessed to stealing property should not be given make-whole relief despite a finding that he was discharged in violation of Section 8(a)(1) & (3) of the Act. *Id.* at 665. See also *NLRB v. Big Three Welding Equipment Co.*, 359 F.2d 77 (5th Cir. 1966) (same).¹⁰

Although many employment relationships are unfriendly or even adversarial, employers must be able to trust their employees. When there is a lack of trust, management is circumspect about delegating responsibility and efficiency is lost by over-supervision and scrutiny. This reality is appreciated by members of the labor and management bargaining committees who negotiated the National Master Freight Agreement and Western States Area Supplemental Agreement – ABF's labor contracts. Accordingly, they have agreed for years that employee dishonesty is grounds for immediate discharge.¹¹

¹⁰ Employees who have threatened other employees have also been denied reinstatement because such a remedy would not effectuate the policies of the NLRA. See *NLRB v. R.C. Can Co.*, 340 F.2d 433 (5th Cir. 1965) (court refused reinstatement where employee threatened president of employer with bodily harm); *NLRB v. Red Top, Inc.*, 455 F.2d 721 (8th Cir. 1972) (employee denied reinstatement for threatening supervisor with physical harm).

¹¹ Although the Board found that Manso was not terminated for dishonesty, in apparent disagreement with the ALJ,

This common sense understanding that honesty and trust are core values in a civil society permeates the line of circuit court cases declining to enforce NLRB rewards to liars and tortfeasors. Also implicit in the rationale of these cases is the realization that public trust in government agencies is eroded when those agencies work for the advantage of individuals who abuse the system. In the present context, forcing employers to rehire charging parties who have committed character suicide will do little to deter unfair labor practices or maintain industrial peace, but will do a lot to portray the NLRB as a result oriented agency unconcerned with the integrity of its processes.

D. The NLRB Has Significant Powers To Enforce The Act And Deter Future Violations Without Rewarding Perjury.

The Board will not and has not been hand-tied in its ability to enforce federal labor policy by case law refusing to enforce its awards of make-whole relief to charging parties and discriminatees guilty of misconduct or false testimony. Reinstatement with backpay is only one of

section 46 of the Western States Supplemental Agreement (ABF's bargaining agreement) provides for immediate discharge if an employee is dishonest. (J.A. 37). Contrary to the purposes of the Act, forcing ABF to compensate and maintain an employment relationship with someone as undeserving as Mr. Manso is in effect a penalty. The Act does not prescribe penalties in vindication of public rights. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941).

many remedies the NLRB may impose. Violations of section 8 of the Act can be adequately deterred without enriching witnesses who abuse NLRA procedures in hopes of personal gain.

Traditional and effective measures taken by the Board upon a finding that section 8(a) has been violated include: cease and desist orders, notice posting orders, expungent orders and visitorial clauses. The Board can move beyond traditional orders and take more strident measures to deal with repeat violators of the Act. The goals are to protect concerted activity and avoid disruptions of commerce, and the Board has adequate tools to do that without its knee jerk resort to backpay and reinstatement.

When an employer has committed violations of sections 8(a)(1), 8(a)(3) or 8(a)(4), the Board will issue a cease and desist order. The order will proscribe the unlawful conduct in the specific case and require the employer to cease and desist from violating the Act "in any like or related manner." The order is usually confined to the particular geographic location involved. *See, e.g., Hickmott Foods*, 242 NLRB 1357 (1979); *J.P. Stevens and Company*, 240 NLRB 33 (1979), *enforced*, 612 F.2d 881 (4th Cir.), *cert. denied*, 449 U.S. 918 (1980); *Chase National Bank*, 65 NLRB 827, 829 (1946); *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

Cease and desist orders not only impose a continuing prohibition on future NLRA violations, but also subject an employer to contempt sanctions for violating the order. *NLRB v. C.E. Wylie Constr. Co.*, 934 F.2d 234 (9th Cir.

1991). If an employer does not cease or resumes an unfair labor practice, the Board is entitled to an enforcement decree from the appropriate Court of Appeals. *See, e.g., NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950). Contempt sanctions can be severe if that is what is necessary to get a recalcitrant employer's attention.

Cease and desist orders are analogous to permanent injunctions issued in Title VII discrimination cases. Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e-5(g) *et seq.* An injunction compels an employer to abide by federal law and, once again, subjects an employer to contempt if future violations are committed. In the Title VII context, the effectiveness of injunctions to reduce the chilling effect of an employer's alleged retaliation on its employees' exercise of their Title VII rights has been recognized. *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987); *Norris v. Arizona Governing Comm.*, 671 F.2d 330 (9th Cir. 1982) (injunction against use of sex-segregated annuity tables), *aff'd in part and rev'd in part on other grounds*, 463 U.S. 1073, 103 S.Ct. 3492 (1983).

A second form of remedy in unfair labor practice cases, which is a component of the cease and desist order, is posting a notice for 60 days informing employees of the substantive obligations of the order. The notice must be posted in a place where it is likely to be observed by employees. The Board may also require an employer to mail notices to each employee. *See, e.g., United Garment Workers*, 295 NLRB 411 (1989). Posting of a notice advises employees about the NLRB's order, and announces the readiness of the employer to obey the order and to "cease and desist" from violating the Act. *NLRB v. Express Pub. Co.*, 312 U.S. 426, 438 (1941). Notice posting is not an

innocuous requirement to employers. As a practical matter, notice posting informs employees of their rights, tells them that the company has been found to have violated the law, and encourages them to come forward with additional allegations of unfair labor practices.

Even when circuit courts have refused to enforce NLRB orders compelling reinstatement with backpay because of employee misconduct, they have still enforced NLRB cease and desist and notice posting orders. *See, e.g., NLRB v. Mutual Maintenance Service Co.*, 632 F.2d 33 (7th Cir. 1980); *NLRB v. Apico Inns of Cal., Inc.*, 512 F.2d 1171 (9th Cir. 1975). Similarly, in this case, the Tenth Circuit could have denied Manso reinstatement and backpay while enforcing the cease and desist and notice posting aspects of the NLRB order.

— A third remedial measure traditionally used by the Board is the expungement order. By such orders, the Board requires an employer to remove references to adjudicated and unlawful conduct from its files, notify the employee in writing that this has been done, and to refrain from using the expunged matters against the employee. *See, e.g., Ft. Wayne Foundry Corp., Machining Division*, 296 NLRB 127 (1989); *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). In effect, the employee's record is cleared. For a discharged employee denied reinstatement, that means the grounds for discharge (i.e., tardiness) could not be disclosed in reference checks.

Quite commonly, attorneys' fees and defense costs for an employer confronted with a single person unfair labor practice complaint exceed the amount of backpay in controversy. Employers defend these cases vigorously,

not because backpay and reinstatement would be materially adverse, but because they want to prove innocence and avoid the stigma of a finding against the company.

To deal with employers undeterred by declaratory and injunctive relief, the Board can order "extraordinary" remedies where employers have committed pervasive or outrageous unfair labor practices. For instance, some Board orders have required employers to (i) include a copy of the posted notice in an appropriate company publication, (ii) publish the notice in a local newspaper, (iii) grant a union reasonable access to company bulletin boards, or (iv) grant a union reasonable access to employees in the plant in nonwork areas on nonworking time. *See, e.g., United Dairy Farmers Cooperative*, 242 NLRB 1026 (1979); *Haddon House Food Products*, 242 NLRB 1057 (1979), *enforced as modified*; *Teamsters Local 115 v. NLRB*, 640 F.2d 392 (D.C. Cir. 1991), *cert. denied*, 454 U.S. 827 (1981).

Another extremely significant weapon in the Board's arsenal is the "visitorial clause." A visitorial clause is an invitation for the Board to oversee the respondent's employment practices. It permits the Board to periodically examine the books and records of an employer, to take statements from officers and employees and non-parties, and to monitor whether the employer is complying with the NLRB's order. *See, e.g., Cherokee Marine Terminal Div.*, 287 NLRB 1080 (1988). By obtaining a visitorial clause, the General Counsel does not need to follow formal post-judgment discovery procedures under FRCP 69 and any information obtained may be used against an employer during contempt proceedings.

Cease and desist orders, notice posting, visitorial clauses, contempt proceedings, and specialized remedies tailored to the particular violation are all effective means at the Board's disposal. If the employer is still not convinced to respect the Act, the Board is not disarmed. This is because stiffer remedies can be crafted to deal with repeat offenders. *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 70 S.Ct. 826 (1950).

A discussion in *NLRB v. Jack La Lanne Management Corp.*, 539 F.2d 292 (2d Cir. 1976) is instructive. There, the Second Circuit enforced a broad cease and desist order against an employer in which the Board required posting in all of La Lanne's 10 health spas in New York City. The court stated:

The Board is afforded wide latitude in fashioning relief, and its order, which is designed to protect the employees' Section 7 rights, is justified by the repetitive nature of the Company's misconduct.

Id. at 295.

In *United Steelworkers of Am. v. NLRB*, 646 F.2d 616 (D.C. Cir. 1981), the court examined the issue of union access as a remedial measure beyond the plant where the unfair labor practice occurred. The court stated that, "It has long been evident to the Board and the courts that some 'stronger medicine' is necessary to effectuate the policies of the Act in cases of recidivist violators. As a result, it is now firmly established that the Board has the

power to take into account a history of recalcitrance in designing a remedial order." *Id.* at 630.¹²

No employer guided by rational self-interest wants to run the risk of being viewed as a labor outlaw – a repeat violator of the Act. One unfair labor practice case does not put an employer in that category, but the road to extraordinary remedies for unfair labor practices begins with one decision against the company and that is a step few if any businesses will lightly take. The Board's authority to craft broader and more stringent remedies against a recidivist is a meaningful power for purposes of promoting federal labor policy.

Finally, the Board may order employers to pay for the litigation costs of the adjudicatory proceedings. For instance, when an employer's defense to an unfair labor practice complaint is "frivolous," the Board has ordered the employer to reimburse the charging party and the Board for their litigation costs and to reimburse the Union for excess organizational costs. *See, e.g., Electrical Workers (IUE) v. NLRB*, 426 F.2d 1243 (D.C. Cir.), *cert.*

¹² *See also NLRB v. S. E. Nichols, Inc.*, 862 F.2d 952 (2d Cir. 1988), *cert. denied*, 490 U.S. 1108 (1989) (employer's long history of illegal anti-union activity justified imposition of extraordinary remedies); *J. P. Stevens & Co., Inc. v. NLRB*, 612 F.2d 881 (4th Cir. 1980), *cert. denied*, 449 U.S. 918 (1980); *NLRB v. J.H. Rutter-Rex Mfg. Co., Inc.*, 396 U.S. 258 (1969); *Int'l Union of Elect. Radio and Machine v. NLRB*, 426 F.2d 1243 (D.C. Cir. 1970); *J.P. Stevens & Co., Inc. v. NLRB*, 441 F.2d 514 (5th Cir. 1971), *cert. denied*, 404 U.S. 830 (1971); *Textile Workers v. NLRB*, 475 F.2d 973 (D.C. Cir. 1973) (NLRB has power and obligation to take an employer's history of violating the Act into account when ordering remedies in an ULP case).

denied, 400 U.S. 950 (1970), *on remand*, 194 NLRB 1234 (1972), *enforced as modified*, 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 417 U.S. 921 (1974); *Winn Dixie Stores, Inc.*, 224 NLRB 1418 (1976), *enforced in part*, 567 F.2d 1343 (5th Cir.), *cert. denied*, 439 U.S. 985 (1978). The Board can arguably seek reimbursement and costs from employers who are in contempt of a Board order enforced by the circuit court or who are found to be repeat violators of the Act.

Plainly, other remedies for curtailing ULP's are available when the remedy of reinstatement and backpay will not effectuate policies of the NLRA. To award the latter remedy to Manso and other employees who have committed perjury is to elevate perjury to the status of a protected activity under the Act. In summary, refusing enforcement of the Board's order requiring reinstatement and backpay to Manso will accomplish three goals: (1) deterring employers from violating the Act, (2) deterring witnesses from violating their oath, and (3) encouraging the Board to effectively use the Federal Rules of Evidence in performing its factfinding responsibility under the Act.

E. Courts Have Repeatedly Recognized That Rights And Duties Under The NLRA Must Be Balanced With Rights And Duties Under Other Laws.

Rights and duties of individuals and businesses in the United States derive from a complicated scheme of statutes, as well as the Constitution, and cases that have acquired the force of law at different times and in differing circumstances over a few hundred years. The NLRA is one source of rights and duties that is relatively new to

the network of legal obligations in the country. As important as it is, the NLRA must co-exist with other statutes and legal precedent and that has sometimes meant compromise.

One early and ongoing confrontation has been between section 7 rights under the Act and rights of property owners. In *NLRB v. Babcock & Wilcox, Co.*, 351 U.S. 105 (1956), the Court held that an employer's property rights may prohibit the distribution of union literature on the employer's premises by non-employee union organizers if: (1) reasonable efforts through other available channels of communication will enable unions to reach employees, and (2) the employer does not discriminate against the union by allowing distribution of items by other non-employees. More recently, in *Lechmere, Inc. v. NLRB*, ___ U.S. ___, 112 S.Ct. 841 (1992), the Court overturned a Board ruling allowing non-employee organizers to handbill in a shopping mall parking lot.

Another area of tension involves employer speech in union representation campaigns. The prohibition against employer interference with exercise of section 7 rights is at odds with the First Amendment protection of free speech. Again, the NLRA had to be compromised. In *Livingston Shirt Corp.*, 107 NLRB 400 (1953), the Board held that an employer does not commit an unfair labor practice if it makes a pre-election speech on company time and premises to its employees and denies the union's request for an opportunity to reply. *Id.* at 409. This rule was approved in *NLRB v. Steel Workers (Nuton, Inc.)*, 357 U.S. 357 (1958), as long as the union has other means to carry its message to the employees. *See also NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941)

(employers had a constitutional right to express opinions that were non-coercive in nature).

Conversely, the right to engage in conduct protected under a literal reading of section 7 has been held to be constrained by other legal duties. In *Linn v. Plant Guard Worker Local No. 144*, 383 U.S. 53 (1966), a manager sued a union for defamation based on statements in union leaflets which were distributed during an organizing campaign. The Court held that a state defamation action concerning utterances made during an organizing campaign will not be preempted by the NLRA if the complainant can plead and prove that the statements were made with malice and can show actual damages. "Although the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party the license to injure the other intentionally by circulating defamatory or insulting material known to be false." 383 U.S. at 61.¹³

¹³ Additionally, intentional infliction of emotional distress claims in some situations are not preempted by the NLRA. In *Farmer v. Carpenters Local 25*, 430 U.S. 290 (1977), a union member claimed that he had been denied job referrals and subjected to a campaign of abuse and harassment by the union. The Court upheld the state court's jurisdiction over the harassment allegation, even though such conduct "might form the basis for unfair labor practice charges before the Board." *Id.* at 302. See also *Keehr v. Consolidated Freightways of Del., Inc.*, 825 F.2d 133 (7th Cir. 1987) (intentional infliction of emotional distress and privacy claims based on verbal and physical abuse by supervisor not preempted); *Saquin v. Haley Bros., Inc.*, 652 F. Supp. 581 (C.D. Cal. 1987) (state tort claims for breach of implied covenant of good faith and fair dealing and intentional infliction of emo-

There are even areas where rights and duties under the NLRA have given way to societal values that do not have a specific source of legal protection. One example is entrepreneurial rights. The Court has directed that a balancing test must be applied when the duty to bargain under Sections 8(d) and 8(a)(5) of the Act abridges core management objectives. See *Fibreboard Paper v. NLRB*, 379 U.S. 203, 213 (1964); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981) (employer was not obligated to bargain over cancellation of customer contract – bargaining over management decisions affecting availability of employment required only if the benefit for labor-management relations outweighs burden on conducting business).

A similar balance must be struck between carrying out the policy of the NLRA with deterring obstruction of justice through perjury. The Court has made clear that promoting truth in testimony is a vital public concern:

Perjury is an obstruction of justice; its perpetration well may affect the dearest concerns of the parties before a tribunal. Deliberate material falsification under oath constitutes the crime of perjury and the crime is complete when the witness' statement has once been made. . . . [T]he oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance and delay of

tional distress arising from wrongful discharge not preempted by NLRA where actions giving rise to discharge were not concerted activities).

ultimately extracting the truth by cross examination, by extraneous investigation, or other collateral means.

United States v. Norris, 300 U.S. 574 (1937).¹⁴ By ordering reinstatement and backpay to Mr. Manso, the Board ignored this refrain.

The Board cannot follow an ambiguous course of allowing deliberately false testimony to go undeterred in some instances and not in others. A bright line test is needed. To maintain the integrity of the oath administered at NLRB hearings, the Board must be prohibited from awarding reinstatement and backpay when a charging party or discriminatee deliberately testifies falsely about facts relating to his/her conduct and the employment practice at issue in the case.

II.

THE AWARD OF REMEDIAL RELIEF IN THIS CASE IS INCONSISTENT WITH DECISIONS CONSTRUING ANALOGOUS STATUTORY SCHEMES AND WITH THE TREATMENT OF PERJURY IN THE FEDERAL COURTS.

The reinstatement and backpay provisions of the NLRA are closely analogous to similar provisions of Title VII of the Civil Rights Act of 1964, as amended.¹⁵ Indeed,

¹⁴ See also *United States v. Mandujane*, 425 U.S. 564 (1976), quoted on page 16 above. 18 U.S.C. § 1621 applies to false testimony in an administrative hearing. Perjury is defined in note 8 above.

¹⁵ Compare 29 U.S.C. § 160(c) (the Board, upon finding that an unfair labor practice has been committed, shall "take such

the backpay provision of Title VII was, as this Court has observed, expressly modeled on the backpay provision of the NLRA. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 777 n.39 (1976) (observing in dictum that make whole remedy under NLRA is narrower than Title VII counterpart). Given the similarities between the two statutory schemes, an analysis of Title VII jurisprudence in the area of employee falsification and lying is instructive and demonstrates the flaws in the decision of the Board and Tenth Circuit.

It is well settled under Title VII that evidence of employee misconduct, including intentional falsifications and misrepresentations, acquired by the employer after discharge of the employee should be considered by the court in determining whether the employee's discharge was wrongful and, if so, what remedies for such discharge are available to the employee. Although there is a split between the various Circuit Courts of Appeals that have addressed the question of the legal effect to be given such evidence, the cases have uniformly held that, at a minimum, such evidence bars or limits an employee's right to recover damages and disqualifies the employee from reinstatement entirely.

affirmative action including reinstatement of employees with or without back pay" to effectuate the policies of the Act) with 42 U.S.C. § 2000e-5(g) (upon finding that an unlawful employment practice has been committed, the district court may enjoin the practice "and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay").

A. After Acquired Evidence Cases Holding That All Relief Under Title VII Is Barred.

The Sixth and Seventh Circuits, ironically applying the rationale of the Tenth Circuit in *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), have held that employees engaging in deliberate falsifications both before and after the commencement of their employment, are barred completely from any relief under Title VII. *Summers*, 864 F.2d at 708 (falsehoods by employee after commencement of employment); *Milligan-Jensen v. Mich. Technological Univ.*, 975 F.2d 302, 304-5 (6th Cir. 1992), cert. granted, ___ U.S. ___, 113 S.Ct. 2991 (1993) (false statements in employment application regarding prior conviction for driving under the influence of alcohol); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409, 415 (6th Cir. 1992) (false statements in employment application regarding educational background); *Washington v. Lake County, Ill.*, 969 F.2d 250, 253-57 (7th Cir. 1992) (false statements in employment application). Under each of the above decisions, employees engaging in deliberate misrepresentations to their employers, much less egregious than the falsehoods told by Mr. Manso under oath, have been denied all relief under Title VII.

B. After Acquired Evidence Cases Holding That Relief Under Title VII Is Limited Rather Than Barred.

The Eleventh Circuit, while declining to adopt the *Summers* rationale, has nonetheless held in a Title VII and Equal Pay Act case that evidence of an employee's application fraud, discovered after she had filed suit, barred

the employee from the prospective remedies of reinstatement, front pay or injunctive relief. *Wallace v. Dunn Constr. Co., Inc.*, 968 F.2d 1174, 1181-82 (11th Cir. 1992). In its analysis of the *Summers* holding, the Court in *Wallace* observed that reinstatement or front pay to the employee would go beyond making the employee whole and would unduly limit the employer's freedom to lawfully discharge employees. *Id.* at 1182. Moreover, the Court limited the employee's eligibility for backpay to the time period at which the employer would have discovered the false statements of the employee in the absence of the employer's allegedly unlawful acts and the related litigation. However, even under this analysis, reinstatement of the employee was held to be improper by virtue of the employee's deliberate falsifications. *Id.*

Plainly, the Title VII and Equal Pay Act cases forcefully support the proposition that an employee who has deliberately lied to his employer should not be entitled to retain his employment status. The Board's decision to the contrary in this case, as affirmed by the Tenth Circuit, is repugnant to the analogous Title VII jurisprudence and should be reversed. Moreover, this Court's grant of certiorari in *Milligan-Jensen* should have no effect whatsoever on the universally accepted principle that evidence of employee misrepresentations and falsifications results, at a minimum, in the denial of reinstatement and the elimination or reduction in backpay. Further, such analogous cases do not involve issues of a party seeking relief while lying under oath in a legal proceeding.

C. Treatment Of Perjury And Falsification Of Evidence In Federal Litigation

By affirming the Board's award of reinstatement and backpay to Manso, the Tenth Circuit has rewarded Manso for perjury in a manner completely inconsistent with the general treatment of perjury and falsification of evidence in the federal courts. Contrary to the permissive approach taken by the Board and the Tenth Circuit in this case, the federal courts have consistently taken an extremely dim view of perjury and falsification of evidence in the federal courts, applying the most extreme and severe sanctions available for such misconduct.

For instance, in *Pope v. Federal Express Corp.*, 138 F.R.D. 675 (W.D. Mo. 1990), *aff'd in part and vacated in part on other grounds*, 974 F.2d 982 (8th Cir. 1992), the district court found that the plaintiff in a Title VII action had manufactured a document in support of her claim of sexual harassment. Such conduct, the court held, violated Fed. R. Civ. P. 11 and warranted the dismissal of the lawsuit in its entirety pursuant to Rule 11 as well as the court's inherent equitable power to impose sanctions. 138 F.R.D. at 683. On appeal, the Eighth Circuit acknowledged that dismissal of the lawsuit was a severe sanction, yet nonetheless found that the district court had not abused its discretion in dismissing the case and in finding "that manufactured evidence and perjured testimony had been introduced in an attempt to enhance the case through fraudulent conduct." 974 F.2d at 984. As noted by the Eighth Circuit:

When a litigant's conduct abuses the judicial process, the Supreme Court has recognized dismissal of the lawsuit to be a remedy within the inherent power of the court.

Id., citing *Chambers v. NASCO, Inc.*, ___ U.S. ___, 111 S.Ct. 2123, 2133 (1991).

Similarly, severe sanctions have been imposed by the federal courts for abuse of the discovery process. The federal courts have not hesitated to dismiss lawsuits under Fed. R. Civ. P. 37 where the conduct of a party or the party's counsel has been evasive, contumacious and resulting, at least in part, from intentional misconduct. See *Bluitt v. Arco Chemical Co.*, 777 F.2d 188, 190-91 (5th Cir. 1985) (dismissal of Title VII sex discrimination case affirmed where the court concluded that the plaintiff's "evasive and contumacious" conduct had resulted, at least in part, from intentional misconduct); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781 (1976) (dismissal of lawsuit affirmed by reason of respondents' flagrant "bad faith" and their counsel's "callous disregard" of their responsibilities).

Manso's conduct in testifying about facts he knew to be untrue would, in the context of litigation in the federal district courts, expose him to the harshest sanctions available under federal law. The Board's award of reinstatement and backpay in this case is illogical and inconsistent with the legal and ethical standards by which litigants appearing in federal proceedings are bound and should be reversed. Petitioner urges that the Court make clear that interested witnesses found to have deliberately violated their oath by giving false testimony in unfair labor

practice hearings will not be allowed to directly benefit by the outcome of the case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the decision of the Tenth Circuit be reversed, and this case be remanded to the Tenth Circuit with instructions to vacate its order enforcing the award of reinstatement with backpay.

Respectfully submitted,

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